United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7369

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA RIVERA MENDEZ, individually and on behalf of all other persons similarly situated,

Plaintiff,

LOUISA ROMAN, individually and on behalf of all other persons similarly situated,

Intervenor-Plaintiff-Appellant,

-against-

HON. LOUIS B. HELLER, individually and as Presiding Justice of Special Term, Part V, of the Supreme Court of the State of New York, Kings County, NAT LIEBOWITZ, individually and as Chief Clerk of Special Term, Part V, of the Supreme Court of the State of New York, Kings County, both individually and on behalf of all other persons similarly situated, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants-Appellees.

REPLY BRIEF FOR
PLAINTIFF-APPELLANT

JOHN C. GRAY, JR.
MARJORY D. FIELDS, Of Counsel
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
(212) 855-8003
Attorneys for Plaintiff-Appellant

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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief for appellees-defendants ("defendants"), dated September 26, 1975.

ARGUMENT

POINT I

THIS CASE PRESENTS A CASE OR CONTROVERSY

Defendants raise only a few new points not already dealt with in the main brief of plaintiff-appellant ("plaintiff"). First, on page 18 of their brief defendants cite O'Shea v. Littleton, 414 U.S. 488 (1974), to support the claim that there is no case or controversy in this case. In O'Shea, the plaintiffs sought injunctive relief against alleged discrimination in the conduct of criminal proceedings by state judges. But since no plaintiff had a pending court case,

> the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners [the judges]. Important to this assessment is the absence of allegations that any relevant criminal statute of the State of Illinois is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law.

414 U.S. at 496. Thus this case is clearly distinguishable from O'Shea. Here there is no doubt that a state statute is alleged to be unconstitutional. Here no third party must charge violations of law before

plaintiff is subject to the jurisdiction of the court. Here plaintiff asserts not that state judicial personnel will discriminate but merely that they will continue to enforce in good faith a civil statute they have continuously enforced in the past. If anything, the factors relied on by the Supreme Court in O'Shea indicate that this case does present a case or controversy.

Second, defendants contend on page 19 of their brief that plaintiff's husband is an indispensable party. The court below did not find that the husband was an indispensable party, Mendez v. Heller, 380 F. Supp. 985 (1974), and there is no support in the case law for this claim. Respondent cites only Glatstein v. Walsh, F. Supp. (S.D.N.Y. Sept. 26, 1973), aff'd without opinion, 493 F.2d 1397 (2d Cir. 1974), cert. denied, 419 U.S. 839 (1974). But as defendants themselves admit, Glatstein involved a federal challenge to alleged irregularities in a state divorce case already held. The spouse had been party to the prior state proceeding and thus necessarily had an interest in a subsequent case which might change its result. In this case we have the opposite situation, the spouse's interest is in a divorce proceeding which has not yet taken place because plaintiff cannot initiate such a proceeding. The interests of plaintiff's husband are in the divorce proceeding itself and will be protected in that case when it is begun. That the spouse is not an indispensable party is confirmed by Sosna, 419 U.S. 393 (1975). There the plaintiff's husband

was not joined as a party and the Supreme Court found this no ba. to a decision on the merits. Defendants' assertion on page 19 of their brief that Mr. Sosna was joined is mistaken. Neither were the plaintiffs' spouses joined in Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968), rev'd on other grounds, 401 U.S. 371 (1971), in which the plaintiffs, like plaintiff here, challenged the constitutionality of a statute which barred access to the state courts to obtain a divorce.

Third, defendants claim on page 20 of their brief that plaintiff does not point out defendant Heller's responsibility as an administrator. Again, this is incorrect. As plaintiff stated on page 10 of her main brief, defendant Heller is the administrative superior of the clerk who decides whether or not to accept divorce pleadings. In this capacity he controls the administrative operations of the matrimonial part including the actions of its employees, the clerks. Again, in this respect the present case is identical to Boddie v. Connecticut, supra, in which a supervising administrative judge was a defendant. 286 F. Supp. at 971-72.

In each of their arguments, defendants fail to provide a legal basis for the dismissal of this case on the ground that it fails to present a case or controversy.

POINT II

THIS COURT HAS JURISDICTION TO DECIDE THE MERITS OF THIS CASE

On pages 23 et seq. of their brief defendants argue that if this Court decides the case or controversy issue for plaintiff, it must remand to the three-judge court for a decision on the merits. Defendants reason that 28 U.S.C. §1291 gives this Court jurisdiction only when no "direct review may be had to the Supreme Court," and that direct review of the merits would be available if this Court remanded to the three-judge court after reversing on the jurisdictional issue.

This reasoning flies in the face of the strong policy of minimizing the use of direct appeal stated by the Supreme Court in Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1975). In Gonzalez the Court interpreted its jurisdiction over direct appeals from three-judge courts under 28 U.S.C. §1253 to exclude denials of injunctive relief based on jurisdiction. The present case involves the same policy of avoiding direct appeals, but in inverted form. Here the question is whether 28 U.S.C. §1291 gives this Court jurisdiction over the merits of a case where both jurisdiction and the merits were grounds for decision by the three-judge court and where a decision on the merits

by this Court would thus obviate the need for direct appeal after a possible remand to the three-judge court.

This question can be resolved by following rationale of the Supreme Court in Gonzalez. Given the immense practical difficulties involved, direct appeal from a three-judge court should not be required unless it is "inexorably commanded by statute." 419 U.S. at 96, quoting Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965). In this case 28 U.S.C. §1291 clearly does not "inexorably command" a remand to the three-judge court for direct appeal to the Supreme Court. In fact, this Court has jurisdiction because the Supreme Court has already decided that no direct appeal is available.

The only other argument against a decision on the merits by this Court is that it would offend the policy of the three-judge court statute, 28 U.S.C. §2281 et seq. by allowing interference with enforcement of a state statute by a single federal judge. But no violation of this policy could occur here. Decision on the merits by this Court would occur only after consideration by the three-judge court. And, in any event, a decision by three-judges of this Court would fulfil the goal of preventing interference with state enforcement by a single judge. See Seergy v. Kings County Republican County Committee, 459 F. 2d 308 (2d Cir. 1972).

The only case cited by defendants on this issue is Goosby v. Osser, 409 U.S. 512, 522 (1973) (Defendants' Brief, p. 28). But Goosby deals with an issue different from the one before this Court. In Goosby the Third Circuit affirmed a decision by a single judge not to convene a three-judge court because the claim was insubstantial. The Supreme Court reversed the finding of insubstantiality and indicated that the case should be remanded to the district court for decision on the merits. 409 U.S. at 522 n. 8. In contrast, this case comes to this Court after the convening of a three-judge court and after a decision by that court on the merits. In Goosby the merits were not before the court of appeals except as they were tangentially involved in the issue of substantiality. Here the merits are before this Court not only as an alternative basis for dismissal but also through the denial of plaintiff's motion for summary judgment of declaratory relief. Thus while a remand was necessary in Goosby to give the three-judge court a first opportunity to decide the merits, remand is unneeded here since the merits have already been decided by the three-judge court and are properly on appeal before this Court.

Finally, the principle of conservation of judicial manpower, which both the Supreme Court, Gonzalez, 419 U.S. at 98, and this Court, Seergy v. Kings County Republican County Committee, supra at 313, have recognized as fundamental in resolving three-judge court problems, calls for a decision by this Court on the

merits. There is no practical reason to reconvene the three-judge court to reconsider its view of the merits when this Court has the issue, fully briefed before it, with further, but not direct review by the Supreme Court available to both parties.

For all these reasons, this Court should consider the merits of this appeal if it decides that this case presents a case or controversy, rather than requiring the reconvening of the three-judge court.

POINT III

NEW YORK'S TWO-YEAR DURATIONAL RESIDENCE REQUIREMENT FOR DIVORCE IS UNCONSTITUTIONAL

In their brief, defendants do not deal with plaintiff's central argument: that a one-year requirement can fully satisfy every New York interest in having a durational residence requirement for divorce and that a two-year requirement is therefore unconstitutional under the line of Supreme Court decisions from Shapiro v. Thompson, 394 U.S. 618 (1969), through Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). This failure is especially significant because the Supreme Court has noted that

> Fixing a constitutionally acceptable period is surely a matter of degree.

Dunn v. Blumstein, 405 U.S. 330, 348 (1972). See also Memorial Hospital v. Maricopa County, supra at 638, n. 21. Thus, even if a one-year residence requirement for divorce is reasonable and constitutional, a two-year requirement is not. See Plaintiff's Main Brief, pp. 18-26.

In addition, on pages 50-51 of their brief defendants attempt to distinguish Shapiro on the ground that plaintiff here did not lose her right to get a divorce in her state of prior residence, while Mrs.

Thompson lost her right to get welfare in her old state. This argument is doubly fallacious. First, even apart from the economic impossibility of plaintiff's going to another state to get a divorce, it is not clear that plaintiff and members of her class could go elsewhere to get divorces. Like most states, New York requires that at least one spouse be a resident for a specified period to give the state courts divorce jurisdiction. New York Domestic Relations Law §230; 50-State Compilation Issued by The National Legal Aid and Defender Association, Divorce, Annulment and Separation in the United States (1973). Plaintiff's legal ability to get a divorce outside New York would depend, inter alia, on where her husband lived and how long he lived there, as well as other technical requirements which are imposed by other states. Thus plaintiff and other persons similarly situated may well not have an alternative forum for divorce even if they could afford to go to another state.

Second, defendants assert without citation that the proposition that Mrs. Thompson could not have returned to her former residence to receive public assistance is "inherent" in Shapiro v. Thompson, supra. This is not correct, many jurisdictions, including New York, New York Social Services Law §121, will provide potential welfare recipients with transportation money to return to other states. Accordingly, defendants' attempts to distinguish Shapiro v. Thompson, supra, on this ground are unavailing.

CONCLUSION

For all the foregoing reasons, the order and judgment of the district court should be reversed and remanded to the district court with instructions to enter judgment for plaintiff and to certify the action as a class action with respect to both plaintiff and defendant classes.

Respectfully submitted,

John C Gray. Jr.

John C. Gray, Jr.
Marjory D. Fields, Of Counsel
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

Attorneys for Intervenor-
Plaintiff-Appellant

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

John C Gray, Jr. being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 157 Bergen St, Brooklyn, N.Y.

Check Applicable Box

☑ Affidavit of Service By Mail

On October 16, 1975 deponent served the within reply brief of plaintiff-appellant upon Louis J Lefkowitz attorney(s) for defendants-appellees in this action, at 2 World Trade Center, N.Y., N.Y. the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service

On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on Oct. 16 1975

Michael O'Connor

MICHAEL A. O'CONNOR
Notary Public, State of New York
No. 31-8190798
Qualified in New York County
Commission Expires March 30, 1976

John C Gray Jr

The name signed must be printed beneath